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De Dienstenrichtlijn in Nederland

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2015

document version

Publisher's PDF, also known as Version of record

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citation for published version (APA)

Botman, M. R. (2015). *De Dienstenrichtlijn in Nederland: De gevolgen van richtlijn 2006/123/EG voor de nationale rechtsorde vanuit Europees perspectief*. [, Vrije Universiteit Amsterdam]. Boom Juridische uitgevers.

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Summary

The Services Directive in the Netherlands

Assessing the legal impact of directive 2006/123/EC on the national legal order from a European perspective

Background and central question

This research assesses the legal impact of the Services Directive 2006/123/EC on the Dutch legal order. This Directive establishes a new legal framework to ensure the freedom of establishment for service providers and the free movement of services, while maintaining a high quality of services. National authorities have to operate within the legal framework set out by the Directive. The objective of the Directive is to create a genuine internal market of services, so that both business and consumer can take full advantage of their fundamental freedoms guaranteed in Articles 49 and 56 VWEU; the freedom of establishment and the freedom to provide services across borders. Service providers, such as real estate agents, management consultants, architects and restaurant-owners should be able to start up a branch or subsidiary, or provide services in another Member State on a temporary basis, just as easily as in their own Member State. In order to achieve this, the provisions of the Services Directive aim to simplify administrative procedures, remove obstacles for service activities as well as enhance both mutual trust between the Member States and the confidence of providers and consumers in the internal market.

The Directive differs from other directives due to its horizontal approach; in contrast to other (sector-specific) directives, the Services Directive covers all services in the EU, unless explicitly excluded from its scope. This horizontal character makes the potential scope of the Directive very broad. According the European Commission approximately 50 % of all services activities provided in the EU fall within the scope of the Services Directive. This broad scope combined with stipulated obligations indicates that the impact of the Directive for the national legal order is significant.

Article 288 TFEU imposes an obligation on the Members States to achieve the result prescribed by the Directive. To achieve these objectives, full and timely implementation is crucial. In addition, the major economic interests interwoven with the Directive increases the pressure put on the Member States. Services are the main driver of the European economy, as they account for 70%

of GDP and employment in most Member States. A well-functioning and truly integrated single market for services is a key tool for creating the growth, jobs and necessary innovation in Europe.¹ The Directive is therefore considered the cornerstone for the realisation of the internal market for services. With a view to this, the European Commission is applying a zero tolerance policy in cases of non-compliance with certain obligations that the Directive imposes on the Member States. Moreover, on the basis of the Services Directive, new follow-up measures are being taken to further develop the single market for services. However, at the same time the understanding and the implementation of the Services Directive raises fundamental questions, both in legal scholarship as well as in practice. Therefore, this research aims to gain a clear understanding of both content and scope of the Services Directive while offering reflection and evaluation of the Dutch implementation of the Directive. In the end, this research should contribute to a correct implementation of the Directive and its follow-up measures by all national authorities. In a broader sense, it should provide deeper understanding of the integration of European Union law into national (administrative) law, thereby contributing to academic debate.

The assumption underlying the research is that national and European law form one integrated legal system, irrespective of its constitutional relationship between the autonomous legal orders. European law is increasingly implemented, applied and enforced by administrative authorities and in judicial procedures within the framework of national law. The Services Directive is a very good example of this development; the Directive cuts like a knife through EU law and national law and puts a lot of existing European principles, case law and doctrines to the test. In view of the fact that EU law and national (administrative) law are becoming increasingly intertwined, this research is based on a so-called integrated approach, which can be distinguished from a national or a dualistic approach.

The central question of this thesis reads as follows:

What requirements follow from the Services Directive in relation to the existing acquis?

What tensions currently exist in the Netherlands between these European requirements and national law and how could these tensions be solved?

In order to answer the central question, the research consists of two parts.

¹ COM (2011)20 final, p. 2.

Part I: The Services Directive from a European perspective

To discover the legal consequences of the Services Directive for the Dutch legal order, the first part of the research unraveled the Directive itself from a European perspective. The actual impact of the Services Directive depends in the first place on its content and its scope. However, like any other piece of legislation, the Services Directive needs to be seen in the context of primary law as explained in the case law of the Court of Justice. This is, in particular, the case for the Services Directive since its provisions are, to a large extent, based upon the case law of the European Court of Justice relating to the freedom of establishment and the freedom of services. The Directive must be interpreted and implemented in this context. Hence, in Part I, the Directive is analysed from three different angles as outlined below.

European implementation requirements: the Services Directive is an ongoing challenge

The first perspective from which the Services Directive is analysed, addresses the question what exactly is required to implement the Directive properly. This is discussed in *chapter 2*. As mentioned before, Article 288 TFEU obliges the Member States to achieve the result prescribed by a directive. To fulfill this obligation they must secure the full implementation of the directive into their national legal order. Leading principles in this regard are the principle of legal certainty, the principle of effective judicial protection and the principle of full effect. It follows from Article 288 TFEU that Member States have the choice of forms and methods for the realisation of the result prescribed by a directive. However, on the basis of the above mentioned principles, the Court of Justice has formulated strict requirements which the implementing measures must satisfy. It is settled case law that Member States have to provide for binding national provisions on which citizens can rely in court. Besides, with the mere transposition of a directive into national legislation, the implementation job is far from done. To ensure the full effect of a directive, emphasis is increasingly placed on the application and enforcement of the provisions of EU law. The rules must be applied and enforced in practice by all national authorities by means of their national procedures. Only then will the benefits of the directive unfold. Administrative practices which may undermine the full effect of the directive must be avoided. Furthermore, even after the implementation deadline the legislator must check that new legislation is compatible with the directive. In other words: directives impose a continuous obligation upon the Member States. This is a fortiori the case with the Services Directive. The Directive itself requires Member States to take measures beyond the December 2009

implementation deadline, such as a mutual evaluation procedure and the ongoing obligation to notify changes in requirements applicable to the European Commission. In addition, the Commission has proposed new measures to further deepen the single market for services on the basis of the Services Directive. These actions make clear that the instruments that are laid down in the Directive, for example the introduction of the ‘points of single contact’ and the system of administrative cooperation, are long-term projects that are being further developed and expanded beyond the implementation deadline. The same follows from the Europe 2020 strategy, which stresses that an open single market for services must be created on the basis of the Services Directive and that the correct implementation of this Directive is very important for increasing trade in the EU. In other words, although the implementation deadline of the Directive has expired, the influence of the Services Directive has not. The Services Directive is a long-term project and an ongoing challenge for the Member States.

The requirements of the Court of Justice are not concerned with the quality of legislation that is used to transpose a directive. However, it is argued that in order to build a coherent and consistent legal system, this is an important element to consider when transposing directives. ‘Smart’ regulation can enhance legal certainty and transparency. In the end, it can enhance a better application of European law. According to policy guidelines of the European Commission and the Dutch legislator, legislation must be simple, clear, stable and a predictable regulatory framework for business, workers and citizens. Moreover, it must be feasible, effective and efficient in achieving its goals. The Directive supports this agenda for better regulation, as it aims to simplify authorisation procedures and to reduce administrative burdens. The Directive shows that soft guidelines to improve the quality of regulation can become hard commitments.

Interpretation methods in an integrated legal order: differences and fragmentation must be avoided

As the national authorities have to apply and enforce European law, directly or by means of transposed legislation, problems may arise when the exact meaning of certain terms or provisions is unclear. This problem occurs particularly with respect to the Services Directive. Therefore, the second angle from which the Directive has been approached, contains the methods and principles the Court of Justice uses to interpret secondary legislation (*chapter 3*). After all, the Court ultimately determines the proper interpretation of European law. European concepts have an autonomous meaning within EU law. They cannot be interpreted differently according to rules or principles of different Member States. As a corollary, European interpretation methods prevail over national

methods. Accordingly, these methods of interpretation must be taken into consideration by national authorities when applying and enforcing the provisions of the Directive. Hence, it has been analysed how and to what extent the European methods of interpretation can influence the interpretation of national law. It is submitted that in this regard it is of great importance that national legislators, administrative authorities and courts are aware of the fact that certain concepts have a European origin and have to be interpreted in accordance with their European meaning. Moreover, it is argued that the European interpretation methods should not only be applied when a national authority is required to do this on the basis of European law, but also in situations where, in regulating purely internal situations, domestic legislation adopts the same solutions as those adopted in European law e.g. in order to avoid discrimination against its own nationals or any distortion of competition. In other words: provisions or concepts taken from EU law should be interpreted uniformly, irrespective of whether the national authorities are under the European obligation to do this. Differences of interpretation between EU law and national should be avoided.

Furthermore, it is proposed that the interpretation of the Services Directive is closely related to the discussion regarding the (hierarchical) relationship between primary law, the legislator and the judiciary. It is argued that the interpretation of the terms and provisions in the Directive should as much as possible be reconciled with the corresponding terms and concepts as explained and developed in settled case law. This means that amongst others the qualification of terms such as ‘services activity’, ‘establishment’ and ‘public order’ should correspond with each other. Also, in this regard, differences of interpretation should be avoided in order to prevent that the services *acquis* becomes fragmented. This also follows from Article 3 of the Directive, which provides that the Member States shall apply the provisions of the Directive in compliance with the rules of the treaty on the right of establishment and the free movement of services. This starting point means that also new case law should be taken into consideration when interpreting the Directive. An exception is possible where the European legislator has explicitly deviated from this case law, under the condition that this specific interpretation is in conformity with primary law, which is to be determined by the Court of Justice.

The content and scope of the freedom of establishment and the freedom to provide services

Chapter 4 and 5 address the third and last angle from which the Services Directive is approached in Part 1. These chapters contain a discussion on the content and scope of the freedom of establishment and the freedom of services

as clarified and developed over the years through case law of the Court of Justice. As the Services Directive is to a large extent inspired by this case law, it is of utmost importance to have in-depth knowledge on this matter, in order to properly understand and implement it. Subsequently, the concept of ‘service’ and its demarcation towards goods, capital and establishment was scrutinized in order to discover what kind of activities fall under the scope of the Directive.

The Services Directive unraveled: less competence, more commitments

Finally, in *chapter 6 and 7*, the core of part I, the content and the scope of the Services Directive are examined in detail in the light of the three angles as set out in *chapter 2 to 5*.

In summary, the conclusion is that even though the Services Directive is to a large extent based on the case law concerning the freedom of establishment and the freedom of services, the establishment of the Directive has significant legal impact on the regulatory autonomy of the Member States. The Directive is only to a very small extent a codification of the case law of the Court of Justice. Instead, the Directive alters existing case law and establishes strict boundaries for the national legislator. The Directive stipulates if and under what conditions authorization schemes or other requirements for service providers are justifiable. These boundaries are more rigorous than those following from the case law under Articles 49 and 56 TFEU. This is, for example, the case in Article 14 which establishes a list of prohibited requirements. Moreover, Article 16 stipulates that requirements for temporary service providers must be justified for reasons of public policy, public security, public health or the protection of the environment. In this regard it is important to mention that according to settled case law, where directives provide for the harmonization of measures necessary to ensure the protection of certain interests, any national measure relating to it must be assessed within the new legal framework outlined by the directive and not articles relating to primary law. Hence, to justify imposed national requirements on a service provider falling within the scope of the Services Directive, recourse to 56 TFEU or 49 TFEU is no longer possible. As a corollary, it must be assumed that the Directive no longer leaves the Member States room to justify discriminatory requirements.

While the regulatory competence of the Member States to impose requirements on service providers has diminished under the Directive, the Member States are at the same time -in comparison with the existing acquis- subject to more far-reaching obligations and tasks. For example, Article 6 and 8 establish the obligation for the Member States to ensure that each provider has a ‘single point of contact’ through which he can complete all procedures and formalities relating to access to a service activity and to exercise thereof. This ‘single point of contact’ must be easily accessible by electronic means such as

internet. In other words: all administrative procedures and formalities may be completed by electronic means. For the first time, Member States have entered into a legal commitment to put e-government services in place. Furthermore, Article 13 contains conditions with regard to the authorisation procedure such as the mechanism of tacit authorisation, which means that where an application has not received any response within the set time period, the authorisation will be deemed to have been granted to the service provider. Another example is the obligation of Member States to give each other mutual assistance using the so-called Internal Market Information System (IMI).

The conclusion is that under the Services Directive the Member States have less competences, but more commitments. With regard to legislation or activities that do not fall under the scope of the Directive, these obligations do not apply, at least not yet. Since the research showed that the Services Directive is to some extent ahead of the case law of the Court of Justice or European legislation, there is a serious possibility that some obligations will be expanded to areas that do not fall under the scope of the Directive.

In view of the fact that the above obligations are (for now) confined to the scope of the Directive, as the aim of the research is to discover the impact of the Directive on the national legal order, defining its scope is of great relevance. Therefore, in *chapter 6* the material and personal scope of the Directive has been scrutinized. Firstly, it is made clear which service activities fall under the scope of the Directive, which are exempted and why. Secondly, examination reveals which national measures fall under the Directive's scope and which fields of law are exempted. Attention has been paid to the question regarding the breadth of the term 'requirement' as referred to in the Directive and Recital 9 in relation to the case law of the Court of Justice. Thirdly, the position of services of general economic interest was identified. Fourthly, specific analysis reveals the identity of who are the beneficiaries of the Services Directive in relation to those of the fundamental freedoms under primary law.

The analysis revealed that defining the scope of the Directive is a hard nut to crack. Some fundamental issues remain unclear. This concerns, amongst others, in the first place the debate to what extent the sale of goods falls under the scope of the Services Directive. Although this dispute has been settled on national level, on European level it has not. It has been argued that the conclusion that the Directive does not cover distributive trades is right, in view the aim of the directive and the system of the TFEU combined with the settled case law. However, to avoid (possible) tensions and the risk that the Netherlands will receive penalty payments for non-compliance, a suggestion is made to lodge a reference for a preliminary ruling to the Court of Justice on this matter. Another debate with relation to the scope concerns the applicability of the

Directive in purely internal situations. In order to definitely determine the exact impact of the Directive for the national legal order, the Court must take a stand.

Face to face with a two-headed monster

The first part of the research revealed what exactly is expected from the Member States regarding the implementation of the Services Directive. This analysis resulted in a legal framework that not only applies for Dutch national authorities but also for the other 27 Member States. Accordingly, the first part of the central question has been answered.

The analysis conducted in Part I showed that the Directive and *acquis* concerning the freedom of establishment and the freedom to provide services are, in a special way, intertwined. On the one hand they are closely connected because they pursue the same objective and are based on the same core. A continuous dialogue is going on between the two regimes; primary law together with case law influence the interpretation of the Directive and vice versa. On the other hand, however, there are big differences between the two frameworks. The impact of the Services Directive for the Member States differs for a large extent from the impact of the fundamental freedoms as established under primary law. In other words, the Directive and the *acquis* are closely connected, but different at the same time. As a result, it is concluded that in fact the Member States are faced with a two-headed monster.

The following question is how to tame this monster. One option is to embrace it by extending its scope. This is a solution the European Commission seems to pursue. The opposite solution instead is to narrow down the scope of the Directive as much as possible, for example by interpreting the activities and measures that are exempted from the Directive very broadly. This option seems to be the answer of the Court of Justice.

Part II: The impact of the Services Directive on the Dutch legal order

The second part of the research switches to national level and reflects on the implementation of the Directive in the Netherlands. In Part II it is analysed and evaluated what legal problems or (possible) tensions between the legal obligations of the Services Directive and its Dutch implementation occur and how these should be solved. The results answer the second part of the research question .

The structure of Part II is as follows. *Chapter 8 and 9* analysed how the Directive was transposed into the Dutch national framework. *Chapter 10* examined how the prescribed concepts, procedures and principles, in particular the requirements concerning electronic procedures and the mechanism of tacit

authorisation, relate to and have (had) impact on the administrative procedures that are enshrined in the Dutch 'General Administrative Law Act' (GALA). *Chapter 11* described the actual impact of the Services Directive on Dutch legislation and policy, including the provincial and local level. Finally, *chapter 12* investigates to what extent the implementation of the Directive in Denmark can offer inspiration to improve Dutch implementation.

The analysis conducted in the second part of the research found that there are several (possible) tensions between the Dutch legal order and the framework that was outlined by the Directive. The most important tensions are presented below.

Tensions with regard to transposition of the Services Directive

First of all, it is argued that currently tension exists with regard to the transposition of the Directive into Dutch legislation.

The Dutch legislator chose to transpose the Directive by means of a horizontal law, the Services Act, combined with specific regulation on the basis of the horizontal law and amendments of sector specific laws if necessary. However, the key provisions of the Services Directive, amongst others Article 9, 14, 15 and 16, in which general principles regarding authorisation schemes have been established, have not been transposed in legally binding provisions. According to the Dutch legislator, the Netherlands already comply with these rules since they are settled case law. Moreover, the key provisions have to be considered as an instruction to the legislator. Instead, to ensure compliance of the key provisions by the legislative authorities, the Dutch Instructions for legislation were amended. These Instructions are a non-binding document; in principle the guidelines have to be followed, but deviations are possible. It is submitted that this minimalistic approach of the Dutch legislator is not in accordance with the requirements that follow from the case law of the Court of Justice with regard to Article 288 TFEU. A non-binding guideline is not suitable for the transposition of the provisions. Moreover, the instructions are only directed towards legislative authorities on central level, not towards local level or to executive authorities.

It is argued that the Dutch legislator should amend the Services Act and transpose the key provisions. The argument that these provisions can have direct effect, does not alter this conclusion. The problem is that directives cannot directly be invoked in disputes between citizens. In other words: if a service provider is being sued because he allegedly does not have a permit in accordance with national law, he cannot invoke the provision in the Directive. Now, the challenge is for the courts to make sure that individuals can rely on their rights in the Services Directive so that it can be effective anyway, for

example by means of consistent interpretation. Another problem is that local authorities might forget about the Services Directive and introduce requirements that are incompatible with it. This could -in breach of Article 288 TFEU- undermine the full effect of the Directive.

All in all, in order to ensure the full effect of the Directive, transposing the provisions into national binding provisions is strongly recommended.

Tensions with regard to the scope of the Directive

Secondly, tensions might occur with regard to the scope of the Directive and the Services Act. It has been assessed that the Services Act currently offers enough flexibility to adjust and adapt the scope to future developments in case law. At the same time, a Ministerial Order that is adopted on the basis of the Services Act with regard to the scope of the Act and the Directive, provides for guidance. This seems to be a good combination of flexibility and legal certainty. However, it remains unclear as to what extent the Services Act is applicable to purely internal situations. It is recommended that the legislator addresses this matter when transposing future directives by taking a clear position.

As mentioned earlier, it is by now settled case law of the Dutch Council of State and the Administrative Court for Trade and Industry that sale of goods is exempted from the scope of the Services Directive. However, on a European level the debate has not been settled yet. With a view to a uniform application of European law and to avoid the risk that the Netherlands act in breach of the Directive, it is advisable to lodge preliminary questions to the Court of Justice on this matter.

Moreover, it is argued that national case law might need some adjustments with respect to what extent environmental regulation falls under the scope of the Act and the Directive. Contrary to the Dutch Ministerial Order, the Dutch Council of State determined that such measures are in principle exempted from its scope in view of Recital 9 mentioned before. It can be questioned whether such high value should be attached to this recital. It is argued that for several reasons the Directive does apply to planning requirements if they affect the access to or exercise of a service activity. Otherwise, Member States could easily bypass the requirements of the Directive by qualifying certain measures as spatial planning. Nonetheless, these kind of measures could probably be justified as long as they are not adopted for economic reasons. So, a slight adjustment of the current case law could solve the inconsistency between the case law and the Ministerial Order that indicates the scope of the Directive as well as a possible inconsistency between the Dutch case law and the framework that was set out by the Directive.

Furthermore, a point of special interest with regard to the case law concerns consistency, for example with regard to the question to what extent purely internal situations fall under the scope of the Directive. This seems to be a matter of time. In view of the fact that defining the scope is not an easy task to do, the judiciary must be granted some time to find a way through the maze of the scope of the Directive.

Finally, it is argued that national courts should not hesitate to lodge preliminary questions if the provisions of the directive are unclear. The Dutch courts have used this instrument already several times.

Tensions between the Directive and administrative law

It is established that there are many differences between the prescribed authorisation procedure and the procedure established in the GALA. For the most part the Dutch legislator acknowledged these differences. The Services Act contains a lot of provisions in addition or in deviation of the GALA. However, as yet, not all difference have been overcome. The research disclosed that there are still a number of possible tensions. This concerns particularly from which moment the period of time in which the administrative authority has to process the application of a service provider, will start running. Another unreconciled difference concerns the possibility to postpone this decision period. Some of these tensions can only be solved by an amendment of either the GALA or the Services Act. In other cases, an interpretation consistent with the Directive will suffice. Since the analysis made clear that the interpretation of some of the terms and provisions in the GALA can be influenced by the requirements of the Directive, it is emphasized that administrative authorities and courts should keep in mind the European legal framework by applying the GALA in cases that fall under the Directive.

Tensions with regard to quality of legislation

Fourthly, the research found a tension between the transposition of the Directive and the principles that should improve the quality of regulation as mentioned above. With the arrival of the Services Act, the Netherlands disposes in fact of two general administrative law acts. It is inefficient for competent authorities to be able to apply two different types of authorisation procedures. Moreover, having regard to the fact that the scope of the Directive is difficult to define, it is far from clear which one of the two procedures is applicable. Therefore, it is suggested that it should be investigated to what extent the two acts can be merged in the interest of a coherent and consistent legal framework that is simple and easily applicable. It may sound drastic to adjust our national administrative law to European law, but this thought it is in line with the

developments concerning a European Administrative Act. Nothing is impossible.

Tensions with respect to autonomous and consistent interpretation

The broad scope of the Directive contrasts sharply with the amount of requirements that were amended or revoked because of the Directive; only very few Dutch requirements have been abolished or amended. There are several clues for the indication that there is a risk that current requirements imposed on service providers are in conflict with the Directive. First of all, not all regulation that falls under the scope of the Directive has been screened to see whether this was compatible with the Directive. Secondly, with regard to the requirements that have been screened, it seems that the authorities did not take into consideration the European interpretation methods and the case law of the Court of Justice, in particular with regard to the proportionality-test. As a result, now it is up to administrative authorities and national courts to set aside incompatible national requirements when appropriate.

To avoid new requirements being adopted in breach of the Directive, it is of extreme importance that national legislators are constantly aware that the framework of the Directive is observed and complied with, to ensure that they act in conformity with the European requirements. The Dutch Instruction for legislation could be supplemented with more and clearer guidelines.

Tensions with respect to mechanism of tacit authorisation

In the Netherlands, the mechanism of tacit authorisation is laid down in the GALA. As regards authorisation schemes that fall under the Services Directive the mechanism applies, unless it is being excluded. However, most authorisation schemes are excluded because of mandatory requirements. It is questionable whether the Dutch legislator has taken too much room to exclude authorisation schemes from the mechanism of tacit authorisation. If so, this could be a risky situation, especially when it must be concluded that Article 13, paragraph 4, of the Directive has direct effect.

Secondly, also with regard to the mechanism of tacit authorisation, the quality of the regulation is a problem. It is almost impossible to determine whether this mechanism applies to a certain authorisation scheme. It is proposed to streamline all the exceptions and make it explicit when the mechanism does not apply.

Tensions with respect to application in practice

Finally, the conducted research found that the application of the transposed provisions of the Directive in practice is a point of interest. The ‘single point of

contact' and the IMI is scarcely used. It is, as yet, too early to conclude that this situation is in breach of the Directive. On the other hand, it is important to note that the Member States are under the obligation to implement the Directive not only in law, but also in fact. Perhaps, some training for civil servants regarding how to work with e.g. the IMI-system will help them see the opportunities the Directive offers.

Who has to make a move?

In summary, it can be concluded that to solve possible tensions between the Dutch legal order and the European legal framework, there is not only a role to play for the Dutch legislator. The administrative authorities should also take action and apply the prescribed procedures and European interpretation methods and set aside incompatible requirements when appropriate. Likewise, the courts have an important role to play, especially when it comes to determining the scope of the Directive and lodging preliminary questions to the Court of Justice.

